(1)

91-1628

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOSEPH ROSENGARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is violative of due process and fundamentally unfair for a district court to enhance a defendant's guideline sentence based solely upon the defendant's informal admissions made to an agent of the court?

II. Whether a defendant has been compelled to incriminate himself in violation of the Fifth Amendment to the United States Constitution where his sentence is enhanced based upon his statements to a probation officer, which statements the defendant was required to make in order to obtain the two-point reduction in sentence for acceptance of responsibility?

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioner Joseph Rosengard respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals is reported at 949 F.2d 905 (7th Cir. 1991), and is attached hereto at Appendix A.

JURISDICTION

On November 15, 1991, the United States Court of Appeals for the Seventh Circuit affirmed the petitioner's conviction and sentence of four month's incarceration. On November 29, 1991, the petitioner filed a Petition For Rehearing. The rehearing petition was denied on January 9, 1992. *See* Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Section 3E1.1(a) of the United States Sentencing Guidelines provides:

> "If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels."

Section 4B1.3 of the United States Sentencing Guidelines provides:

> "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13, unless Section 3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11."

STATEMENT OF THE CASE

Petitioner Joseph Rosengard is a seventy-one-year-old first generation American who resides with his family just outside of Chicago, Illinois. In 1989, Rosengard was indicted, along with ten (10) co-defendants, on charges of conspiring to defraud in violation of 18 U.S.C. § 371, and failure to register a gambling business with the Internal Revenue Service, in violation of 26 U.S.C. § 7203. The United States District Court for the Northern District of Illinois had jurisdiction pursuant to 18 U.S.C. §§ 371 and 3231, and 26 U.S.C. § 7203. Rosengard entered a plea of guilty as to both of the charges against him. In his dealings with the court, the government, and the probation department, Mr. Rosengard was cooperative, honest, and openly contrite.

In a written plea agreement, the parties agreed that Rosengard's offense level under the sentencing guidelines was ten, and his criminal history category was one, thus permitting a sentence of probation. The plea agreement further stated that the defendant would request "the imposition of a term of probation" while the government would make "no specific recommendation" regarding sentence.

During a presentencing interview, a probation officer asked Rosengard to estimate his earnings from unlawful gambling. In reply, Rosengard stated that in his best year he earned $40,000, in some years he lost money, and in other years he did not involve himself with gambling at all. At sentencing, the district court found itself "duty-bound" to fix Rosengard's offense level at 11, the lowest allowable level for a defendant who commits an offense as part of a pattern of criminal livelihood. *See* U.S.S.G.

§ 4B1.3. The government conceded at the sentencing hearing that it had no evidence on which it could establish criminal livelihood "separate from the statements made to the probation officer . . . ." The court sentenced Rosengard, a nonviolent first-time offender to four months incarceration, the minimum allowable guideline sentence for an offense level of 11.

On appeal to the Seventh Circuit, the defendant argued that the district court's enhancement of his sentence, based solely upon his own statements to a probation officer, violated his Fifth Amendment Privilege against self-incrimination. The Seventh Circuit rejected this argument and affirmed the sentence of incarceration. Appendix A. In its opinion, the Seventh Circuit acknowledged that the defendant's candor with the probation officer, which enabled him to benefit from the two-point reduction and thus qualify for probation, subjected him to the enhancement for criminal livelihood. The Court held, however, that such statements cannot be considered "compelled" within the meaning of the Fifth Amendment because a federal probation officer does not act on behalf of the prosecution.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S OPINION ESTABLISHES, FOR THE FIRST TIME, AN OFFICIAL POLICY WHICH DISCOURAGES CANDOR AND SANCTIONS THE USE OF UNCORROBORATED STATEMENTS, WITHOUT FACTUAL OR EVIDENTIARY SUPPORT, AS BASES FOR ENHANCEMENT OF PUNISHMENT.

This case gives this Court the opportunity to address for the first time an issue of critical importance to every criminal defendant prosecuted in the federal system. All such individuals must make an initial decision whether to plead guilty and cooperate or instead proceed to trial. One of the primary inducements under the guidelines for defendants to cooperate with the court and with their accuser, is the increased likelihood of a two-level reduction in sentence based on acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a). However, under the principles set forth by the Seventh Circuit in the instant case, in order to receive that two point reduction, the defendant must provide information which will most likely cause the court to ignore his or her plea agreement. Thus, the end result of the defendant's candor and cooperation may likely be a sentence of imprisonment greater than or equal to the sentence he would have received had he kept his mouth shut and forced the government to prove his guilt.

For these reasons, the opinion below establishes terrible policy. It sends out a warning signal to federal criminal defendants and their attorneys to be wary of entering into plea agreements. The net effect of the Seventh Circuit's opinion will undoubtedly be that more criminal defendants will choose to "roll the dice" and proceed to trial, realiz-

ing that, even if they are found guilty, their sentence will be substantially similar to the sentence they would have received through plea negotiations. Those defendants that do enter into plea agreements, will do so with considerably less candor in realization that everything they say can and will be used against them. Congress could never have intended such a result when it approved the sentencing guidelines.

More significantly, the decision below sanctions the sentencing of criminal defendants based upon uncorroborated statements without factual support. In the instant case, it is conceded that the "criminal livelihood" enhancement of Rosengard's sentence was based solely on the defendant's informal statements to the probation officer. These statements were not under oath and were not corroborated by a single item of evidence.

This Court has held that a criminal defendant has a due process right to be sentenced only upon accurate and reliable information in a proceeding that accords with standards of fundamental fairness. *United States v. Tucker*, 404 U.S. 443 (1972). However, it is even more fundamental to the principle of due process that the courts of the United States protect against even the appearance of impropriety or unfairness in its treatment of the persons who come before it. Federal courts have consistently described probation officers as an extension or arm of the court. *See United States v. Joseph Rosengard*, No. 90-1511, Slip op. at 4-5 (7th Cir. 1991); *Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987).

In *Fare v. Michael C.*, 442 U.S. 707, 720 (1979), this Court described a probation officer as:

> the employee of the State which seeks to prosecute the alleged offender. He is a peace officer, and as

> such is allied, to a greater or lesser extent, with his fellow peace officers. He owes an obligation to the State, notwithstanding the obligation he may also owe to the [defendant] under his supervision. In most cases, the probation officer is duty bound to report wrongdoing by the [defendant] when it comes to his attention, even if by communication from the [defendant] himself.

It is fundamentally unfair and offensive to due process for a district court to enhance the sentence of criminal defendant based *solely* upon informal admissions made by the defendant to an agent of the court or of the government. At the sentencing hearing, government counsel conceded that it lacked a shred of independent evidence concerning these earnings. Moreover, Rosengard himself never provided any additional details concerning those earnings. What specific years were they earned in? What else did Rosengard do for a living during that year? Was it his sole support, or was it merely a small percentage of overall otherwise legitimate income? Such limited, nonspecific, informal and uncorroborated assertions are far too insubstantial to support the enhanced punishment of a defendant. The decision below should be reviewed by this Court to preserve the fundamental fairness of the sentencing process and to maintain the dignity of the federal criminal system.

Additionally, this Court should grant this Petition so that it can consider, for the first time, whether the guidelines require a result which, in effect, penalizes criminal defendants for their honesty and candor with the court or with its agents. Fundamental principles of due process mandate the district court to require some factual corroboration for the defendant's informal admissions to the court in order to justify an enhanced sentence. This result would have an additional benefit of once again assuring that

criminal defendants will have a reasonable incentive to accept responsibility for their transgressions, and to openly admit their guilt without fear of reprisal.

II.

THE SEVENTH CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF THIS COURT WHICH PROHIBIT THE USE OF COMPELLED SELF-INCRIMINATION TO ENHANCE PUNISHMENT.

The Fifth Amendment allows any person "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). This privilege applies to a presentence interview with a probation officer just as it applies at a trial and at a sentencing hearing. *United States v. Frierson*, 945 F.2d 650, 656 (3rd Cir. 1991).

Under the decisions of this Court, the denial of leniency, such as a sentence reduction for acceptance of responsibility, is a penalty which cannot be imposed or threatened on the assertion of the Fifth Amendment privilege. As Justice Powell stated in *Roberts v. United States*, 445 U.S. 552, 557 n.4 (1980): "We doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated."

In *Lefkowitz v. Turley*, 414 U.S. 801 (1977), this Court declared unconstitutional a New York statute that required that public contractors either waive immunity and testify concerning their contracts or lose their current contracts *and* future contracting privileges. This Court held that both of these sanctions were "penalties," although loss of future contracts would seem to be a denied benefit.

This Court has also held that the general rule that the Fifth Amendment privilege against self-incrimination is not self-executing is "inapplicable in cases where the assertion of the privilege is penalized so as to foreclose a free choice to remain silent, and compel incriminating testimony." *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984) (citation omitted). Other Supreme Court cases similarly hold that the government may not seek to induce an individual to forgo the Fifth Amendment privilege by threatening to impose sanctions "capable of forcing the self-incrimination which the Amendment forbids." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). *See also Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Spevack v. Klein*, 385 U.S. 511 (1967). Nevertheless, in the instant case, the Seventh Circuit has approved, for the first time, the use of "compelled testimony" to enhance punishment.

A statement is "compelled", within the meaning of the Fifth Amendment, where an individual is obligated to refrain from raising a legitimate objection to furnishing incriminating information. *Minnesota v. Murphy*, 465 U.S. 420, 437-38 (1984). In *Murphy*, this Court held that the defendant's incriminating statements made to a probation officer were not "compelled" because the defendant "could not reasonably have feared that the assertion of the privilege would have led to [the imposition of a sanction[1]]." *Id.* 465 U.S. at 439. This Court found that the defendant in *Murphy* was merely required to be truthful with his probation officer but was not required

> to choose between making incriminating statements and jeopardizing his conditional liberty by remaining

[1] In *Murphy*, the defendant claimed that he was threatened with the revocation of his probation if he was not truthful with his probation officer.

> silent. Because we conclude that Minnesota did not attempt to take the *extra, impermissible step*, we hold that Murphy's Fifth Amendment privilege was not self-executing.

Id. 465 U.S. at 436 (emphasis added). The State of Minnesota also maintained that it would not, and legally could not, have revoked the defendant's probation for refusing to answer questions calling for information that would incriminate him. *Id.* 465 U.S. at 438.

In the instant case, the government did take "the extra, impermissible step" described in *Murphy*. It is undisputed that, had Defendant Rosengard refused to openly discuss his gambling activities with the probation officer, he would have been foreclosed from a reduction in his sentence for acceptance of responsibility. The Seventh Circuit acknowledged, in its opinion, that the "defendant's candor with the probation officer, which enabled him to benefit from the two-point reduction and thus qualify for probation, also subjected him to the enhancement for criminal livelihood." *United States v. Joseph Rosengard*, No. 90-1511, Slip op. at 4 (7th Cir. 1991).

Because Rosengard would, undeniably, have been punished had he asserted his Fifth Amendment privilege in response to the probation officer's questions, his privilege must be deemed self-executing. Therefore, Rosengard's statements were "compelled" within the meaning of the Fifth Amendment. Accordingly, the use of Rosengard's compelled statements in enhancement of sentence violated his right to be free from compelled self-incrimination. The Seventh Circuit's contrary finding is erroneous and should be reviewed by this Honorable Court.

CONCLUSION

WHEREFORE, Petitioner Joseph Rosengard respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH ROSENGARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 CR 941—**Nicholas J. Bua**, *Judge.*

ARGUED DECEMBER 12, 1990—DECIDED NOVEMBER 15, 1991

Before BAUER, *Chief Judge*, FLAUM and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Defendant Rosengard pled guilty, pursuant to a plea agreement, to one count of conspiring to engage in an illegal gambling business in violation of 18 U.S.C. § 371, and one count of failing to register with the Internal Revenue Service as a person engaged in the business of accepting wagers, in violation of 26 U.S.C. § 7203. The district judge found that defendant's base offense level was 12 and defendant was eligible for the two-level reduction for acceptance of responsibility, but that defendant's offense level could not be less than 11 under the criminal livelihood provision of the Sentencing

Guidelines, § 4B1.3. *See* United States Sentencing Commission, *Guidelines Manual*, § 4B1.3. Defendant appeals the propriety of the criminal livelihood enhancement.

Mr. Rosengard, along with nine other defendants, was charged with operating an illegal gambling business from 1983 to 1989. The business accepted bets and wagers on the outcome of sporting events. Mr. Rosengard managed one of the offices where he accepted bets by telephone, and personally paid and collected wagers from bettors. Although Mr. Rosengard knew that bookmakers were required to register with the Internal Revenue Service, he accepted wagers without registering.

After the charges were brought against him, Mr. Rosengard entered into a plea agreement with the government. Prior to the presentence investigation Mr. Rosengard, his attorney and the government agreed that the base offense level applicable to his offenses was 12. They further agreed that defendant was entitled to the two-level reduction for acceptance of responsibility. However, Mr. Rosengard, his attorney and the government also acknowledged in the plea agreement that these preliminary sentencing calculations would be subject to revision by the court in light of the results of the presentence investigation conducted by the probation officer, and the court's determination of the facts and the applicable law.

Before Mr. Rosengard was interviewed by the probation officer, his attorney advised him that candor during the interview would help to ensure a two-level reduction for responsibility. Following this advice, Mr. Rosengard frankly admitted to the probation officer during the presentence interview that he had been involved in organized gambling periodically throughout his life. The probation officer asked Mr. Rosengard how much money he estimated that he had earned from unlawful gambling. Mr. Rosengard responded that in his best year of gambling he earned $40,000.00, in some years he lost money, and in other years he did not involve himself with gambling. Mr. Rosengard's tax returns for the years 1984 through

1988 reflect an adjusted gross income in excess of $24,000.00 for each year.[1]

In Mr. Rosengard's written statement, he admitted that he had gambled off and on his whole life, and that gambling was something he grew up with: "I believed if I was successful I could go into retirement and assure that my wife and I could live in peace." According to Mr. Rosengard, he held a nongambling job prior to 1984. However, after working three years at that job, he "decided to try to go back into sports betting in a temporary way while continuing at [his job]." He finally left the nongambling job because the hours were hard on him, he had to drive into very dangerous neighborhoods, and he felt the company was not going to remain in business much longer. He explained that because his wife was ill and he "really didn't know anything else [he] could do," he went back into organized gambling in 1985.

At the sentencing hearing, the judge found that "during the presentence investigation and in his written statement to this court, defendant admitted that for several years he has engaged in illegal gambling through which he derived a substantial portion of his income." The judge further found that due to defendant's candid admissions with respect to his significant financial dependence on illegal gambling and pursuant to § 4B1.3 of the Guidelines, Mr. Rosengard's offense level could not be less than 11. Under the Guidelines, the criminal livelihood enhancement eliminates probation as a sentencing option.

Defendant's base offense level was 12. As a Criminal History Category I defendant, Mr. Rosengard could have been sentenced to ten[2] to sixteen months of imprisonment

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[1] Defendant's adjusted gross income was $26,442.00 in 1988, $39,681.00 in 1987, $24,547.00 in 1986, $49,075.00 in 1985 and $51,534.00 in 1984.

[2] Under § 5C1.(d) of the Guidelines, if the minimum term of the Guidelines range for imprisonment is more than six months and no more than ten months, then the minimum term of imprison-

(Footnote continued on following page)

if no adjustments had been made to the offense level; probation for offense level 12 is not permitted. With defendant's acceptance of responsibility reduction of two points, defendant's offense level became 10; this level permits a sentence of six[3] to twelve months and the option of probation. However, defendant's candor with the probation officer which enabled him to benefit from the two-point reduction and thus qualify for probation, also subjected him to the enhancement for criminal livelihood. Under the criminal livelihood enhancement, the minimum offense level permitted is 11. The applicable sentencing range for that level is eight[4] to fourteen months with no option for probation.

Mr. Rosengard argues that the district judge violated his fifth amendment privilege to be free from self-incrimination by using his statements made to the probation officer during the presentence interview to justify the increase in his offense level under the criminal livelihood provision. The fifth amendment provides that no person should be compelled to be a witness against himself in a criminal case. Defendant's argument assumes that a probation officer acts on behalf of the government prosecutors. As we have said before, and emphasize here today, "we do not believe the federal probation officer acts on behalf of the prosecution." *United States v. Jackson*, 886 F.2d 838, 842 n.4 (7th Cir. 1989). "A probation officer . . . is an arm of the court charged with assisting the court in arriving at a fair sentence." *Id.* (citing *Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987)). "[He] is an extension

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[2] *continued*
ment is one-half of the minimum term indicated in the Guidelines range. Thus the judge could impose a term of imprisonment of as few as five months.

[3] Under § 5C1.1(c) of the Guidelines, the minimum term of imprisonment would be one-half of the minimum term specified in the Guidelines range, or three months.

[4] Under § 5C1.1(d) the minimum term of imprisonment would be four months, that was the term imposed by the judge in this case.

of the court and not an agent of the government [and] does not have an adversarial role in the sentencing proceedings." *Id.* The statements made by Mr. Rosengard "were not made to someone acting on behalf of the government prosecutors, [t]hus, the fifth amendment was not implicated." *Id.* at 842 n.4.

Mr. Rosengard also argues that the district judge erroneously found that defendant qualified for the criminal livelihood enhancement. Whether Mr. Rosengard engaged in illegal gambling as his livelihood is a finding of fact. Our standard of review of factual findings of the district judge is highly deferential, and therefore we must accept those factual findings on appeal unless they are clearly erroneous. *United States v. Hintzman*, 937 F.2d 1196, 1199 (7th Cir. 1991). The criminal livelihood enhancement provides, "If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than 13, unless § 3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11." U.S.S.G. § 4B1.3. The application notes to this section state,

> "Engaged in as a livelihood" means that (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wages under federal law; and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period. (*E.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).

U.S.S.G. § 4B1.3.[5] "The object of section 4B1.3 (made clearer by a revision adopted on November 1, 1989, which

[5] The district judge apparently applied the pre-November 1, 1989 version of this provision which used the phrase "from which he derived a substantial portion of his income" rather than the phrase

(Footnote continued on following page)

changes 'from which he derived a substantial portion of his income' to 'engaged in as a livelihood') is to distinguish the professional from the amateur criminal and punish the former more heavily." *Lee v. United States*, 939 F.2d 503, 504 (7th Cir. 1991). Given Mr. Rosengard's income tax returns and job history for the years 1984-88, the district judge could reasonably have found that Mr. Rosengard derived a substantial portion of his income from illegal gambling or that his income from gambling exceeded $6,700.00 in any 12-month period.[6] In addition, in Mr. Rosengard's own words, he chose to be involved in gambling rather than to be legitimately employed, because he "didn't know anything else [he] could do" and if he was "successful [in gambling he] could go into retirement and assure that [his] wife and [he] could live in peace." From these statements, the district judge could reasonably have found that defendant chose to engage in criminal conduct rather than regular legitimate employment. We note that the judge was also permitted to consider the statements made to the probation officer under 18 U.S.C. § 3661 which states, "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Defendant claims that, "the plea agreement is now, in effect, a broken promise," because Mr. Rosengard is not eligible for probation. But at the guilty plea proceedings,

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[5] *continued*

"engaged in as a livelihood" which is the phrase used in the current version. Given the application notes to the current version, we believe that the out-dated standard used by the judge was more stringent than the current standard, thus any error arising from the use of the earlier version was harmless error.

[6] At the time of sentencing, Section 4B1.3 referenced $6,700.00 as 2000 times the hourly minimum wage. The specific reference to $6,700.00 was removed by amendment effective November 1, 1990.

the court asked Mr. Rosengard if he understood that "the court will not be able to determine the Guideline sentence for your case until the presentencing investigation report has been completed and you and the government have had an opportunity to challenge the facts recorded by the probation officer, if indeed, there are any facts you wish to challenge?" Mr. Rosengard indicated that he understood the preliminary nature of the pre-sentencing sentence calculations. *C.f., United States v. Knorr*, No. 90-2422, slip op. at 5 (7th Cir. Sept. 16, 1991) (holding that the defendant could not have a guilty plea set aside on the ground that the sentencing range calculated by the court from the presentence report was higher than he had estimated). Mr. Rosengard was advised by his attorney to be honest with the probation officer in order to ensure a reduction in his offense level for acceptance of responsibility. It may be unfortunate that under the Guidelines such frankness with the probation officer can properly be used by the district court judge to enhance a defendant's sentence under the criminal livelihood provisions. However, that is the law under the current Guidelines regime. *See* 18 U.S.C. § 3661. When a defendant tells all in order to benefit from acceptance of responsibility, he runs the risk of incurring further punishment for what he reveals. The district judge stated at the sentencing proceeding that, "I feel duty bound based upon [defendant's] admission to the probation officer to grant him an extra point because I am convinced beyond any per-adventure of a doubt that [Mr. Rosengard] derived a substantial portion of his income from gambling sources." The record shows that the district judge relied not only on the presentence report, but also on Mr. Rosengard's written statements. We do not find it to be inherently unfair for defendant to be punished for engaging in illegal gambling as his livelihood, a factual finding with ample support in Mr. Rosengard's own written statement and the probation officer's report of Mr. Rosengard's statements made at the presentence interview.

We therefore AFFIRM the decision of the district court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: November 15, 1991

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 90-1511

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSEPH ROSENGARD,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 89 CR 941, Judge Nicholas J. Bua

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of the Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 9, 1992.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 90-1511 v.

JOSEPH ROSENGARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 89 CR 941—Nicholas J. Bua, Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

[Imposition of Sentence — February 22, 1990]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number 89 CR 941-5

UNITED STATES OF AMERICA

v.

JOSEPH ROSENGARD

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

☒ pleaded guilty to count(s) one and two.

* * * * *

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 USC 371	Conspiracy	1
26 USC 7203	Failure to register gambling business with Internal Revenue Service	2

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * * * *

☒ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

* * * * *

February 22, 1990
Date of Imposition of Sentence

/s/ NICHOLAS J. BUA
Signature of Judicial Officer

NICHOLAS J. BUA, JUDGE
Name & Title of Judicial Officer

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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FOUR (4) MONTHS.

It is further ordered that execution of the sentence is stayed pending appeal, and defendant's previously posted bond to stand as bond on appeal.

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judg-

ment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall spend FOUR (4) MONTHS in a work release program.

The defendant shall refrain from engaging in gambling activities in connection with sporting events any place where it is unlawful to do so.

The defendant shall pay for the cost of his imprisonment, $1,210.05 per month, and the cost of his supervised release, $1,100 per year.

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STANDARD CONDITIONS OF SUPERVISION

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[Judgment — Page 5 of 5]

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $40,075, consisting of a fine of $40,000 and a special assessment of $75.

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This sum shall be paid ☒ immediately. (if appeal taken, after appeal resolved)

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